



FEDERAL CANNABIS RESCHEDULING:

KEY IMPLICATIONS FOR CPAs



BOLDREY



TIGGES

Last year, the Department of Health and Human Services (HHS) conducted a reassessment of the scheduling of marijuana, following a directive issued by President Biden in 2022. After their review, the HHS forwarded their conclusions to the Drug Enforcement Administration (DEA) on Aug. 23, 2023, *The Hill* reports. Included in their letter to the DEA was a recommendation that marijuana be rescheduled from its current (at the time of this writing) Schedule I classification to Schedule III, placing it firmly amongst other substances that are not considered high risk for developing physical or psychological dependence among users¹. Of course, just because the DEA is beginning their review now does not necessarily mean they will reach a consensus anytime soon.

"If it's going to happen quickly, it's going to be driven from the top down," says Lance Boldrey, JD, member, Dykema. "Politics could drive this," he adds, "...but the last time the DEA actually moved a substance from Schedule I to Schedule III, it was for hydrocodone combined products, and that spent almost a decade under the DEA's consideration."

"It'd be ideal if it happened," says Todd Tigges, CPA, managing director, UHY LLP, who serves alongside Lance on the MICPA Cannabis Expert Panel, "but I don't believe it is going to be anytime soon."

Of course, unlikely does not mean impossible and, for cannabis at least, eventually change is inevitable. Which is why it is important to start thinking now about what the implications of a schedule change would mean for the cannabis industry as it is today. According to Todd, the two biggest sides to the issue are the legal and tax ramifications. "Obviously, on the tax side, 280E goes away, first and foremost." This is, Todd says, the biggest impact rescheduling would have from a tax perspective as retailers would then be able to claim the ordinary and necessary expenses that other businesses already have access to on their taxes. Though, it would also mean that CPAs providing 280E services as their sole product for the cannabis industry may need to reconsider their strategies in that market. "Once 280E goes away, cannabis becomes like any other business, and compliance, from a tax standpoint, becomes relatively simple. So, opportunities are then going to lie in reporting and things of that nature."



As for the legal end of things, Lance says, results may vary. "It's a state-by-state analysis to figure out what the impacts are going to be." He explains, "For example, there is a law on the books in Michigan that says if cannabis is rescheduled to Schedule II, it can only be sold through the prescription pathway." This is, he reminds, in direct conflict with the state's current stance on adult use for recreation. "That's going to be a fight," he cautions. "The other thing we would see, from a regulatory standpoint – one that really worries me – is the Federal Drug Administration (FDA) is going to have to come up with some real standards for these different uses and means of consumption. I'd be concerned that Michigan's Cannabis Regulatory Agency would decide to adopt those standards, which may or may not be workable for the industry in its current state."

"I agree," says Todd, adding that there are also state line transfer issues to consider. "Similar to the alcohol laws, those are still state licensed. Rescheduling is not going to automatically open interstate commerce across the board." Conversely, he adds, it could open doors for larger pharmaceutical companies to begin buying and consolidating smaller businesses and enter the industry. "They're already familiar with, and can support, all the FDA regulations that would probably come along with this move to Schedule III."

This leads the way to opening demand in the mergers and acquisition (M&A) realm, Lance points out. "One thing we've learned with this industry...the M&A work is by far the largest piece," he says, noting the quick transition Dykema made in order to focus on obtaining licenses to M&A activities. "People need to call on a fairly sophisticated practitioner, because you end up with some really complex business deals." This is all, of course, speculation according to both of them. Further, regardless of if, when or how cannabis is rescheduled, Lance and Todd agree that other legislation

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associated with cannabis, like the SAFE Banking Act, which aims to protect depository agencies from federal criminalization for providing services to legal cannabis retailers, are still necessary and should move forward. Not because it offers sweeping reform, but because it will shift the status quo more favorably for cannabis clients in the banking arena. "There's a misconception that the cannabis economy is still a cash economy," Lance explains. "It's not. Out of 200 industry clients, we don't have a single one that doesn't have a bank account." Further, he shares that some of his clients have even received commercial loans from Michigan banks, and this is one area where he sees opportunity for improvement.

"The market for capital is extremely tight right now. What we're seeing on the lending side, if you find somebody to invest through a loan, you're looking at interest rates between 18% to 22%." A bill like the SAFE Banking Act lowers the perception of risk, Lance adds, which is likely to encourage large, commercial banks to enter the lending arena and, ultimately, lower rates for everyone on loan products.

Both of these measures are still unfolding, however, and could change at any moment. "I think as this plays out," Todd advises, "people should just be cognizant of the potential opportunities, for both attorneys and CPAs, be it merger, complete sales or unwinding some of these unique organizational structures. There are a lot of planning opportunities to advise clients that have potential to generate additional revenue." He explains, "Many of these businesses, when they were setup, involved a number of different entities; some of them had implied interest, some of them had actual interest and some of them had several service agreements in place with all these entities to support one another. So, the complexities for that, if 280E goes away, aren't so necessary anymore."

"Yes," Lance agrees. "I think that would be the biggest work for CPAs – unwinding a lot of these structures that were put in place for 280E purposes but that are otherwise really inefficient and challenging."

The MICPA will continue to monitor and provide updates to members on this issue.

1. Bink, Addy. "If Marijuana is Rescheduled..." *The Hill*. 30 Sept. 2023. Accessed on 21 Nov. 2023.